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EXCEPTION

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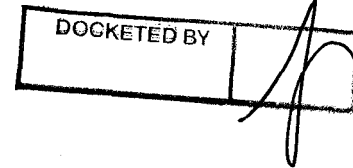
THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF ARIZONA PUBLIC
SERVICE COMPANY - APPLICATION FOR
WAIVER OF CERTAIN REQUIREMENTS
OF A.A.C. R14-2-1609

DOCKET NO. RE-0000C-94-0165

EXCEPTIONS OF ARIZONA PUBLIC SERVICE COMPANY TO STAFF'S RECOMMENDED ORDER

Arizona Public Service Company ("APS" or "Company"), hereby takes exception to the Recommended Order filed by the Arizona Corporation Commission ("Commission") Utilities Division Staff ("Staff") in the above captioned matter on March 29, 2000. Although granting APS a short extension of time to comply with those provisions of A.A.C. R14-2-1609 ("Rule 1609") for which a waiver was requested, the Recommended Order makes an erroneous finding of non-compliance by the Company, attempts to usurp the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), and still leaves APS in the position of having the legal responsibility for ensuring that the Arizona Independent Scheduling Administrator ("AISA") take certain specified actions by certain specified dates - a responsibility APS can neither discharge itself nor compel AISA to discharge by May 15th or any other date.

I. BACKGROUND

The Company attempted both in the Commission's Special Open Meeting of December 13, 1999 and in its Application to emphasize the fundamental shortcomings of Rule 1609, as drafted. APS would again remind the Commission that its is but one of the eleven votes on the AISA Board

Snell & Wilmer

L.L.P.

LAW OFFICES

One Arizona Center

Phoenix, AZ 85004-0001

(602) 382-6000

1 of Directors. Arizona Electric Power Cooperative, Inc. ("AEPCO"), also has one vote. Tucson
2 Electric Power Company ("TEP") and Citizens Utilities Company (the other two transmission-
3 owning Affected Utilities) have no votes at all. Together, Affected Utilities constitute just 4 of the
4 69 AISA members. Concerns about the Company's "incentive" to "meaningfully participate in the
5 development of AISA protocols" (Staff Memorandum at page 2) miss the essential point that APS
6 has no power over and little influence with the AISA.¹

7 APS must also reiterate that the operation of an AISA is not necessary for retail access.
8 Both APS and Salt River Project are actually serving direct access customers. TEP soon will as
9 well. To date, APS has experienced no problems using the protocols developed for wholesale
10 transactions and previously approved by FERC.

11 **II. FINDING OF FACT NO. 4 IS INACCURATE**

12 Finding of Fact No. 4 in the Recommended Order states that "APS has not filed its
13 implementation plan with the Commission as required by R14-2-1609.E." In fact, APS has
14 submitted AISA implementation plan filings in October 1998 and again in October 1999. Staff may
15 or may not be satisfied with those filings, but to state that APS has not complied with Rule 1609
16 (E) to the extent possible is simply inaccurate, and the sentence quoted above should be deleted.

17 **III. THE RECOMMENDED ORDER WOULD USURP FERC AUTHORITY**

18 The Recommended Order directs APS, TEP and AEPCO to develop joint transmission
19 protocols within 15 days for "Commission review and approval." In the accompanying Staff
20 Memorandum, it is stated that: "These protocols may then be used until AISA, DesertSTAR, or
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22

23 ¹ An AISA Board Meeting is scheduled for April 7, 2000, which is concurrent with the
24 filing of these Exceptions. As was the case last December, APS is supporting the draft protocols
25 prepared by other non-utility members of the AISA Board but cannot guarantee anyone's vote but
26 its own on such protocols, let alone their passage. Even if the protocols pass, it is very unlikely
that they can be submitted to FERC by May 15th. APS will come to the scheduled Open Meeting
on this Recommended Order prepared to update the Commission on the AISA meeting and the
status of the proposed AISA transmission protocols..

1 some similar appropriate organization becomes operational.” Although the Staff’s frustration with
2 the AISA process is more than understandable, and is shared by the Company, mere frustration
3 does not change the fact that only FERC can approve and authorize the use of transmission
4 protocols by FERC-jurisdictional utilities.² See *Mississippi Power & Light Co. v. Mississippi ex*
5 *rel. Moore*, 487 U.S. 354 (1988) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953
6 (1986). Indeed, FERC has held:

7 ... jurisdiction over the transmission of electric energy in interstate commerce and
8 over agreements affecting or relating to such service (and the rates for such service)
9 are subject to the [Federal Energy Regulatory] Commission’s exclusive jurisdiction
10 and any attempt by a state authority to exercise jurisdiction over such service, and
11 agreements (and rates) would be *ultra vires*. [*Western Massachusetts Electric Co.*,
12 59 FERC ¶ 61,991 at 61,662 (1992)]

13 On the other hand, Commission support before FERC for whatever protocols can be
14 developed by APS and the other Affected Utilities will, of course, be very important. If by
15 Commission “review and approval,” Staff intended only some manner of preliminary Commission
16 proceeding to obtain that support, APS would have no objection so long as the Commission
17 proceeding was expeditious, as informal as possible, and did not result in giving parties a third bite
18 at the apple (one in the AISA process, another before the Commission, and yet a third before
19 FERC). But even with such Commission support and “approval,” this obvious attempt to bypass
20 the AISA Board will all but guarantee vigorous intervention and opposition before FERC by many
21 of the AISA members, if not by the AISA itself. The likely result is either an outright FERC
22 rejection of the Affected Utilities’ Commission-approved protocols or (more likely) a suspension
23 followed by a lengthy evidentiary hearing at FERC. In the interim, APS and other FERC-regulated
24 utilities would not be permitted to follow these Commission-approved protocols as is apparently
25 contemplated by Staff in the Recommended Order.

26 ²AEPCO is not FERC-regulated, but having the Commission approve one set of protocols
for AEPCO, while FERC approves a different set for APS, TEP and Citizens makes little sense and
may result in AEPCO failing to satisfy the FERC reciprocity requirement for open access to
APS/TEP/Citizens transmission facilities..

1 If by the time this matter is before the Commission, the AISA Board has approved the draft
2 protocols, the controversial issue of a utility-only set of transmission protocols will be moot. It will
3 still be necessary to obtain FERC approval for such AISA protocols, and that will require vigorous
4 Commission support and continued patience by the Commission with the inherently unwieldy AISA
5 governance structure.

6 7 **IV. A WAIVER RATHER THAN A SHORT EXTENSION OF TIME IS APPROPRIATE**

8 Staff has recommended a roughly thirty-day extension (until May 15, 2000) of time in
9 which APS must comply with Rule 1609 rather than an outright waiver. Such a short extension
10 will only result in a second set of waiver requests in early May. The reason is simple. Regardless
11 of how the AISA vote goes on April 7th, the Company (and, for that matter, TEP and AEPCO)
12 will be in no better position on May 15th to comply with Rule 1609 or to compel AISA compliance
13 with Rule 1609 than it was last December 23rd, when the instant Application for Waiver was filed
14 at Staff's request. Continuing to hold Rule 1609 over the Company's head for another thirty days
15 is both futile and unproductive. At the very least, any extension granted should be for an indefinite
16 period of time, with either Staff or the Affected Utilities or both providing progress reports to the
17 Commission. If Staff subsequently determines that the AISA is at an impasse and that further
18 attempts to implement Rule 1609 as drafted are impossible, it could then ask the Commission to
19 direct the development of substitute protocols by the Affected Utilities. However, even in such an
20 instance, a waiver rather than an extension is appropriate since what Staff would be proposing is
21 not compliance with Rule 1609, but rather an alternative to compliance.

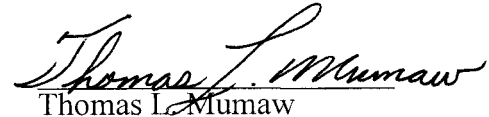
22 **V. CONCLUSION**

23 Requiring APS to be legally responsible for the actions of an entity that neither it nor the
24 Commission can control has never made much sense, and it is an idea that will not improve with
25 age. Attached to these Exceptions are two alternative APS-proposed amendments to the
26

1 Recommended Order. One amendment grants the requested exemption, while the other grants
2 APS an indefinite extension of time in which to comply. Both amendments correct the erroneous
3 Finding of Fact No. 4 and, while calling for the Commission to step in to help resolve an impasse in
4 the AISA process and to thereafter review and "approve" an alternative set of Affected Utility-
5 drafted transmission protocols, both amendments acknowledge FERC's ultimate role in authorizing
6 and approving any use of transmission protocols by FERC-regulated utilities. APS urges the
7 adoption by the Commission of one of these alternative amendments to the Staff's Recommended
8 Order.

9 RESPECTFULLY SUBMITTED this 7th day of April, 2000.

10 SNELL & WILMER L.L.P.

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12 Thomas L. Mumaw

13 Attorneys for Arizona Public
14 Service Company
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APS ALTERNATIVE AMENDMENT NO. 1

Page 1, line 27 - DELETE SENTENCE BEGINNING WITH "APS has . . ."

Page 2, line 11 - DELETE WORDS "may be" AND ADD WORD "are"

Page 2, lines 13-18 - DELETE THIRD, FOURTH and FIFTH SENTENCES IN FINDING OF FACT NO. 7 AND SUBSTITUTE FOLLOWING LANGUAGE:

Upon a determination by Staff that the AISA is at an impasse, Staff should request that the Commission issue an order directing all transmission-owning Affected Utilities to develop their own set of joint transmission protocols for Commission review. Such joint protocols would not become effective, however, until filed with and approved by FERC.

Page 2, line 23 through Page 3, line 8 - DELETE FINDING OF FACT NOS. 9 - 11.

Page 3, lines 15 and 18 - DELETE THE WORDS "deny" AND "denied" AND SUBSTITUTE WORDS "grant" AND "granted"

Page 3, line 19 through Page 4, line 2 - DELETE SECOND, THIRD AND FOURTH ORDERING PARAGRAPHS AND SUBSTITUTE THE FOLLOWING LANGUAGE:

IT IS FURTHER ORDERED that upon a determination by Staff that the AISA is at an impasse, Staff should request that the Commission issue an order directing all transmission-owning Affected Utilities to develop their own set of joint transmission protocols for Commission review. Such joint protocols would not become effective, however, until filed with and approved by FERC.

APS ALTERNATIVE AMENDMENT NO. 2

Page 1, line 27 - DELETE SENTENCE BEGINNING WITH "APS has . . ."

Page 2, line 11 - DELETE WORDS "may be" AND ADD WORD "are"

Page 2, lines 13-18 - DELETE THIRD, FOURTH and FIFTH SENTENCES IN FINDING OF FACT NO. 7 AND SUBSTITUTE FOLLOWING LANGUAGE:

Upon a determination by Staff that the AISA is at an impasse, Staff should request that the Commission issue an order directing all transmission-owning Affected Utilities to develop their own set of joint transmission protocols for Commission review. Such joint protocols would not become effective, however, until filed with and approved by FERC.

Page 2, line 23 through Page 3, line 8 - DELETE FINDING OF FACT NOS. 9 - 11.

Page 3, line 15 - ADD THE WORDS "and instead grant to APS an indefinite extension of time" AFTER THE WORD "waiver" AND BEFORE THE PERIOD.

Page 3, line 19 through Page 4, line 2 - DELETE SECOND, THIRD AND FOURTH ORDERING PARAGRAPHS AND SUBSTITUTE THE FOLLOWING LANGUAGE:

IT IS FURTHER ORDERED that APS' deadline for complying with R14-2-1609 is extended indefinitely.

IT IS FURTHER ORDERED that upon a determination by Staff that the AISA is at an impasse, Staff should request that the Commission issue an order directing all transmission-owning Affected Utilities to develop their own set of joint transmission protocols for Commission review. Such joint protocols would not become effective, however, until filed with and approved by FERC.

CERTIFICATE OF SERVICE

The original and ten (10) copies of the foregoing document were filed with the Arizona Corporation Commission on this 7th day of April, 2000, and service was completed by mailing, e-mailing or hand-delivering a copy of the foregoing document this 7th day of April, 2000, to all parties of record herein.


Vicki DiCola

813223

Snell & Wilmer
— L.L.P. —
LAW OFFICES
One Arizona Center
Phoenix, AZ 85004-0001
(602) 382-6000